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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROSALINDA G., Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al., Real Parties in Interest.	B179117 (Los Angeles County Super. Ct. No. CK 44309)

ORIGINAL PROCEEDING. Petition for extraordinary writ. (Cal. Rules of Court, rule 39.1B). Joan Carney, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition granted.

Sandra DeLong for Petitioner.

No appearance for Respondent.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and Kenneth E. Reynolds, Senior Deputy County Counsel, for Real Party in Interest Department of Children and Family Services.

INTRODUCTION

Petitioner Rosalinda G. is the mother of M.G.,[1] who is a dependent of the juvenile court. Rosalinda filed a petition for extraordinary relief under rule 39.1B of the California Rules of Court seeking review of the juvenile court's November 8, 2004 order terminating family reunification services and setting a permanency planning hearing under Welfare and Institutions Code section 366.26.[2] We conclude the court erred by terminating reunification services and setting the section 366.26 hearing because DCFS failed to shoulder its burden that returning M.G. to her mother's care would create a substantial risk of detriment. Because there is no substantial evidence to support the juvenile court's finding, we grant the petition and direct the juvenile court to return M.G. to her mother's custody, as directed.

PROCEDURAL BACKGROUND AND FACTS

Both Rosalinda and real party in interest Los Angeles County Department of Children and Family Services (DCFS) set out the complete history of the juvenile court proceedings, which do not require repetition except when necessary to address Rosalinda's claims for extraordinary relief.

In December 2000, DCFS filed a petition against Rosalinda alleging she endangered 17-month-old M.G. by leaving her in her car for about 30 minutes while she ate a meal at a restaurant. Rosalinda explained M.G. was screaming loudly and uncontrollably in the restaurant and would not stop. Rosalinda did not want to hit her daughter, so she took M.G. to the car and placed her in the car seat

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1 The child's name, when used in combination with petitioner's name, is sufficiently unique to compel us to use the initials M.G. to refer to the child in order to protect her identity.

2 All further statutory references are to the Welfare and Institutions Code.

with the intention of returning within five minutes in order to allow M.G. time to calm down. M.G. was detained and placed in foster care with Alma O.

DCFS stated in its January 2001 jurisdiction report that Rosalinda had indicated M.G.'s detention had made her appreciate her daughter all the more and that she was willing to fully cooperate with DCFS because she wanted her daughter back. DCFS recommended Rosalinda be provided with reunification services.

In February 2001, the juvenile court sustained the petition and ordered reunification services. Rosalinda was ordered to participate in parent education and individual counseling. She was also granted monitored visitation. M.G.'s father, who appeared at the hearing, was ordered to participate in paternity blood testing.

For the August 2001 review hearing, DCFS reported that Rosalinda had been visiting M.G. twice per week, that the visits were going well, and that Rosalinda was attending parenting classes and counseling. The juvenile court found Rosalinda was in compliance with the plan and granted DCFS discretion to liberalize Rosalinda's visits to include weekend and overnight visits.

In February 2002, DCFS reported Rosalinda was continuing individual counseling and her twice-per-week visits with her daughter. M.G.'s father, who lived with his parents, wanted M.G. to be placed in his care. Based upon DCFS's recommendation, the juvenile court ordered that M.G. be placed in the father's home and that Rosalinda be allowed monitored visits.

By August 2002, M.G.'s behavioral problems prompted her father to ask that she be returned to her mother. Rosalinda was in compliance with the juvenile court's orders. During visits with her mother, M.G. was observed to be very attached to her. M.G. interacted with her mother and was comfortable in her presence, while Rosalinda was observed to be very patient and loving.

Rosalinda had completed a 52-week child abuse treatment program and was attending weekly individual counseling sessions. Her therapist, Sharon D. Heaston, reported Rosalinda made all her appointments on time, was honest, sincere, and motivated to be reunited with her daughter. Ms. Heaston stated Rosalinda was following through on all of her suggestions and that Rosalinda had demonstrated she could handle the pressure and stress of caring for M.G. Rosalinda told the social worker she was willing to comply with family preservation services and do whatever the court ordered so that she could have M.G. returned to her. She recognized her past ineffective parenting style and felt more educated about parenting. Despite the therapist's recommendation that Rosalinda was ready to have M.G. returned to her, and Rosalinda's perfect compliance with almost 18 months of services, DCFS recommended that M.G. remain a dependent of the court because her unmonitored visits had been limited.

Because M.G.'s father was now unwilling to care for her, she was once again detained and placed in foster care with Alma O. The juvenile court ordered that Rosalinda have Friday to Sunday visits every weekend. In an interim report, DCFS stated Rosalinda continued to make good progress and had taken the initiative during M.G.'s overnight visits to have conjoint counseling with Ms. Heaston, even though the court had not ordered such counseling. Ms. Heaston reported Rosalinda was loving, nurturing, and attentive, and that M.G. showed love and affection for her mother. DCFS recommended that M.G. remain in foster care.

On September 27, 2002, Rosalinda and M.G.'s attorney filed section 388 petitions requesting that M.G. be returned to her care. Rosalinda continued to be in full compliance with her case plan, and Ms. Heaston's recommendation remained the same. Nonetheless, DCFS recommended that M.G. remain in foster care.

The juvenile court granted the section 388 petitions on October 2, 2002, and placed M.G. in her mother's home under the supervision of DCFS. The court ordered DCFS to provide family preservation services and that Rosalinda be in weekly conjoint counseling with her daughter.

DCFS reported in February 2003 that M.G. was doing well in her mother's care. Rosalinda was participating in family preservation services and in-home counseling. The in-home counselor expressed some concern that Rosalinda sometimes got "moody" and snapped at M.G., and also allowed her to stay up late. Rosalinda continued her weekly therapy and conjoint sessions with Ms. Heaston. While Rosalinda expressed feeling overwhelmed at times because of all she had to do, Ms. Heaston stated her progress was good and that she had made strides in parenting and stress management. She was open, cooperative, and freely discussed her thoughts and feelings. DCFS continued to believe M.G. was at risk for her safety in her mother's home and recommended against termination of jurisdiction.

In July 2003, DCFS removed four-year-old M.G. from her mother's care and filed a section 342 petition alleging Rosalinda, on one occasion, had disciplined M.G. with a belt. DCFS also alleged Rosalinda was not complying with the court-ordered programs. When interviewed, M.G. explained her mother slept all day long and often cried in the bathroom for long periods of time. The foster mother had observed one occasion when Rosalinda "broke down" crying and yelled at M.G. Ms. Heaston had dropped Rosalinda from therapy because of irregular attendance. DCFS recommended that Rosalinda be evaluated to determine the possible need for psychotropic medication, but also requested that M.G. be placed back in foster care and that Rosalinda not be provided further family reunification services.

The August 2003 report from DCFS revealed that M.G. was having frequent crying episodes. Ms. Heaston indicated M.G. had a tendency to throw

temper tantrums whenever she did not get her own way, that she was a very strong-willed child, and was very oppositional and defiant. Ms. Heaston stated Rosalinda had made substantial progress in setting limits with M.G. and managing her stress, but she often felt overwhelmed. Rosalinda would say M.G. was "too much for her" and that she considered "giving M.G. back to the system." DCFS stated Rosalinda was not "appropriately bonded" with M.G. and continued to recommend that reunification services be terminated.

The juvenile court ordered on September 3, 2003, that M.G. be placed in foster care and that Rosalinda participate in "all counseling per case plan." The court also ordered family reunification services and unmonitored visits.

In October 2003, DCFS requested mother's visitation change from unmonitored to monitored when Rosalinda scratched M.G. during one of her visits. Rosalinda explained the accident occurred while she was trying to control M.G. during one of her crying episodes. The juvenile court granted the request for monitored visits.

Rosalinda's new therapist reported in March 2004 that Rosalinda had started individual counseling on a regular basis with her in September 2003. Rosalinda was committed to reunifying with her daughter, was aware of her needs, and was making better decisions. The therapist opined that conjoint therapy would be very beneficial. Rosalinda felt she would be prepared to take custody of M.G. if given six more months.

In a July 2004 interim review report, DCFS observed Rosalinda and M.G. both wanted to be with each other. Rosalinda and M.G. had commenced conjoint counseling in April 2004 with Ms. Heaston. Ms. Heaston felt Rosalinda had not made sufficient changes in her life in order to care for her daughter. Meanwhile, M.G.'s behavioral problems and aggression were escalating, including oppositional and defiant behavior with the foster mother and school administrators. Incidents were reported of M.G. giving another foster child a

black eye, trying to push a foster child off a top bunk, having "major tantrums" and "screaming fits," striking a child at school with a dish, causing the child's lips to swell, and throwing a pair of scissors at her school teacher's face.

Rosalinda's individual therapist reported she continued to progress positively and demonstrated a continued "sincere desire to progress into a better mother" for M.G. Nonetheless, DCFS opined that Rosalinda was not making progress "in the area of bonding with [M.G.]," and recommended that Rosalinda's visits with M.G. be decreased from twice to once per week. DCFS also recommended that family reunification services be terminated and that the court order a permanent plan of adoption with Alma O., the foster mother.

By the time of the continued section 366.21, subdivision (e), review hearing on July 26, 2004, the foster mother had decided against adopting M.G. due to her "severe emotional and behavioral issues." The foster mother was even considering having M.G. removed from her home. Because a physician had recommended that M.G. take psychotropic medication, DCFS asked the foster mother to keep M.G. in her home until "the efficacy of the medication [could] be determined."[3] Consequently, DCFS changed its recommendation and stated it would not object to continuing family reunification services for another six months. The juvenile court ordered DCFS to continue to provide reunification services, that M.G. undergo a psychological evaluation, and that conjoint counseling be discontinued.

In its September and October 2004 reports for the section 366.21, subdivision (f), hearing, DCFS reported M.G.'s behavioral problems had dramatically decreased since she began taking the psychotropic medication. There

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[3] M.G. was diagnosed with Oppositional Defiant Disorder on July 20, 2004, and prescribed up to 2 mgs. per day of Risperdol, an anti-psychotic drug. The target symptoms sought to be controlled were oppositional defiant behavior, physically aggressive behavior, poor impulse control, anger, and poor ability to carry out tasks.

had been no further tantrums or episodes and M.G. was "happier and more in control of herself." M.G.'s teacher reported a "marked change" and was pleased with her success. M.G. was calmer, able to focus and finish her work, and was "visibly happier and more confident." Her pushing, hitting, and temper tantrums had dissipated. In addition, M.G.'s cooperation and academic progress had substantially improved. In short, M.G. had become an "exemplary student."

The foster mother also noted a significant change in M.G.'s behavior since taking the medication. She stated that prior to taking the medication M.G. was stubborn, would scream and pull her hair, push other children, and sometimes bite herself. The foster mother admitted she was at times overwhelmed by M.G.'s tantrums. Now, "she only wants to play and be happy." The foster mother stated the difference in M.G. behavior was "like night and day." So dramatic was M.G.'s transformation that the foster mother had changed her mind about returning her and was now willing to adopt her.

Rosalinda's therapist stated Rosalinda was continuing to take positive steps to build a lifestyle that could support her daughter and was sincere in her desire to be a good and loving parent. Ms. Heaston, the conjoint therapist, stated she had not observed any "bonding" between Rosalinda and M.G. DCFS stated that according to a supervising children's social worker who observed one of Rosalinda's monitored visits with M.G. on September 28, 2004, there was no "emotional connection" or "bonding" between them. DCFS concluded Rosalinda had failed to develop a "mother-child relationship" with M.G. and recommended the termination of reunification services.

The contested section 366.21, subdivisions (f), hearing took place on October 22, and November 1 and 8, 2004. The juvenile court considered the September and October 2004 reports from DCFS and took judicial notice of its prior minute orders and the sustained petitions. DCFS stipulated Rosalinda had

complied with the court's orders and case plan. As a result, the social worker was not called to testify.

M.G., through her counsel, requested she be placed with her mother. Counsel stated M.G. had always wanted to be with her mother, and argued, among other things, that Rosalinda had complied with all court orders and was willing and capable of taking her daughter immediately. DCFS disagreed and argued Rosalinda's compliance was not dispositive.

The juvenile court agreed with DCFS, terminated reunification services, and set a section 366.26 hearing. The court noted the case was unusual in that Rosalinda was allowed more than 40 months of reunification services. The court also found Rosalinda had completed all of the services requested by the court, that Rosalinda wanted her daughter back, and that Rosalinda was capable and willing to take her immediately. Nonetheless, the court found Rosalinda was "self-involved and has never had a true parent-child relationship" with M.G. The court further found Rosalinda was passive during visits and did not understand the child's need for physical affection or the "relation she needs to foster with her child." The court ruled, "It would be highly detrimental to the emotional well-being of this little girl to be returned to the birth mother, who is incapable of putting the child's needs ahead of her own."

Rosalinda filed a timely petition for extraordinary writ challenging the juvenile court's ruling.

PETITIONER'S CONTENTIONS

Rosalinda contends there is no substantial evidence to support the juvenile court's finding that return of M.G. to her care would create a substantial risk of detriment to M.G. Specifically, Rosalinda contends the trial court erroneously focused on the issue of the apparent lack of "bonding" between her and her daughter, which is not a proper issue at a permanency planning hearing. We agree

with Rosalinda and conclude there is no substantial evidence to support the court's finding of substantial risk of detriment. We therefore grant the petition.

DISCUSSION

A. The Statutory Burden.

Both section 366.21, subdivision (f), and section 366.22, subdivision (a), provide that at a 12- or 18-month hearing to review the child's status, "The court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child."[4] (§ 366.22, subd. (a).)

"Sections 366.21 and 366.22 require that if a child may not safely be returned to the child's parents within a maximum of 18 months from removal from the parents' care, the trial court must terminate reunification efforts and set a section 366.26 hearing. [Citation.] Prior to terminating reunification services, the court must make a determination that it would be detrimental to the child to be returned to the parents' custody. [Citation.] The proceeding terminating reunification services and setting a section 366.26 hearing is usually the parents' last opportunity to litigate the issue of parental fitness as it relates to any subsequent termination of parental rights, or to seek the child's return to parental custody. [Citation.] Up until the time the section 366.26 hearing is set, the parents' interest in reunification is given precedence over a child's need for stability and permanency. [Citation]." (*In re Julia U.* (1998) 64 Cal.App.4th 532, 543; see also *In re Michael R.* (1992) 5 Cal.App.4th 687, 695-696 ["The focus

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[4] Typically, when family reunification services extend through the maximum 18-month period contemplated by section 361.5 subdivision (a), the permanency hearing is conducted under the provisions of section 366.22, subdivision (a). The juvenile court in this case conducted the hearing under the 12-month provisions of

during the prepermanent planning stages is preserving the family whenever possible [citation] whereas the focus after the permanent planning hearing is to provide the dependent children with stable, permanent homes"].)

The burden of establishing substantial risk of detriment is always on DCFS. (§§ 366.21, subd. (f), 366.22, subd. (a).) At each review hearing there is a statutory presumption the child will be returned to parental custody, and the juvenile court *must* return the child unless there is evidence doing so will create a risk of substantial detriment to the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308.) This standard is high and does not mean merely that the parent in question is less than ideal, did not benefit from reunification services as much as was hoped, or seems less capable than an available foster parent or other family member. (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 789 (*David B.*).)

The juvenile court's determination that a child would suffer substantial risk of detriment if returned to the physical custody of the parent is reviewed for substantial evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763.) "Substantial evidence" means such evidence that is reasonable in nature, credible, and of solid value; it must actually be substantial proof of the essentials that the law requires in a particular case. (*In re N. S.* (2002) 97 Cal.App.4th 167, 172.)

B. The Lack of Substantial Evidence.

There is no substantial support in the record that was before the juvenile court that return of M.G. to her mother would be detrimental to her physical or emotional well being. We agree with Rosalinda that the court essentially focused on the issue of "bonding" between her and M.G. But whether a parent and child

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section 366.21, subdivision (f). Because, however, the standard is the same under both statutes, the juvenile court applied the correct standard.

demonstrate a "bond" during the sterile confines of monitored visitation or conjoint counseling is not a relevant inquiry before reunification services are terminated. (See *David B.*, *supra*, 123 Cal.App.4th at p. 788.)

"Until services are terminated, reunification is the goal and [a parent] is entitled to every presumption in favor of having [her child] released to [her] custody. . . . ¶ The preference for maintaining family relationships does not depend on [the parent's] ability to make [her child] feel bonded to [her] . . . . The issue at this point is whether placing [the child] in [the parent's] care represents some danger to her physical or emotional well-being. The existence of a parental bond takes on independent significance only after the reunification effort is terminated and the case is sent to the permanency planning stage." (*David B., supra*, 123 Cal.App.4th at p. 788.)

Other than the bonding issue, the juvenile court did not articulate any facts or make any findings which demonstrated substantial risk of detriment if M.G. was returned to her mother. In contrast, the juvenile court found, and DCFS stipulated, that Rosalinda had fully complied with all of the court's orders and case plan. This included parenting classes, one year of a child abuse program, and many months of individual counseling, as well as conjoint counseling.[5] The juvenile court also found Rosalinda was capable and willing to immediately take custody of M.G.

Furthermore, as we have already noted, Rosalinda's progress in counseling continued to be positive. DCFS points to the fact that Rosalinda's therapist did not express an opinion that M.G. should be returned to her care. What is more important, in our view, is that neither Rosalinda's therapist, nor any other expert,

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[5] We note Rosalinda's compliance with the juvenile court's case plan was in addition to her compliance with the terms of her probation, which was imposed by the criminal court as a result of her initial act of leaving M.G. unattended in her car. The terms of her probation included counseling, anger management, and 175 days of community service.

stated M.G. should *not* be reunited with her mother. DCFS also stresses the fact that throughout the dependency case Rosalinda was "ambivalent" about having M.G. in her care. Not only were the last of Rosalinda's feelings of ambivalence expressed in July 2003, almost a year and one-half before the challenged ruling, but their import is significantly diminished when one considers that even the foster mother expressed the same feelings over M.G.'s uncontrollable behavioral problems and was contemplating having M.G. removed from her home.

Finally, we believe it is significant that M.G., through her counsel, continued to express her desire to be reunited with her mother. Apparently, this fact was not considered by the juvenile court.

In sum, what emerges in this difficult case is a frustrated mother, who has a difficult child and made the terrible mistake of leaving her 17-month-old daughter unattended in her car in December 2000. For almost four years, Rosalinda, with few exceptions, complied with every program and requirement asked of her, despite M.G.'s behavioral problems. M.G. continued to express love and positive feelings toward her mother, and Rosalinda wanted her daughter back. It was not until July 2004 that DCFS determined M.G.'s behavioral problems were so serious and uncontrollable that she required psychotropic medication. By October 2004, it was becoming clear M.G.'s symptoms were controllable with medication, as the difference in her behavior was "like night and day." By that time, however, it was too late for Rosalinda to significantly benefit from M.G.'s dramatic behavioral change in visitation or conjoint counseling.

While Rosalinda's progress with her case plan was less than perfect, that is not the type of progress we look for. We conclude there is no substantial evidence to support the juvenile court's finding of substantial risk of detriment.

Consequently, the court's order terminating reunification services and setting a section 366.26 hearing must be vacated.[6]

DISPOSITION

The petition is granted. Let a peremptory writ of mandate issue, directing the respondent juvenile court to vacate its November 8, 2004 order terminating reunification services and setting the matter for a section 366.26 permanency planning hearing. The juvenile court is further ordered to immediately schedule a review hearing to evaluate M.G.'s status since the November 8, 2004 hearing. Unless the juvenile court determines, in light of new information since November 8, 2004, that return of M.G. to her mother's care would create a substantial risk of detriment to M.G.'s safety, protection, or physical or emotional well-being, the court shall order that she be returned to her mother.

This opinion is final forthwith as to this court pursuant to rule 24(b)(3) of the California Rules of Court.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

RUBIN, J.

FLIER, J.

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[6] Rosalinda also argues in her petition that the juvenile court erred in finding DCFS provided reasonable reunification services. In light of our conclusion that there was no substantial evidence of risk of detriment, we need not reach this alternative argument.